United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1278

To be argued by
BARRY A. BOHRER

B/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET NO. 76-1278

UNITED STATES OF AMERICA,

Appellee,

against

DONALD M. JONES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT DONALD M. JONES

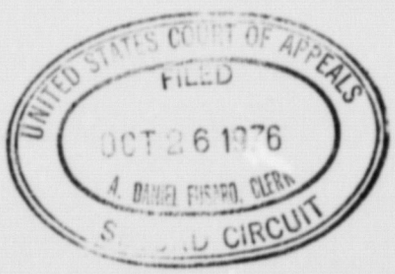

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TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Appellee	:	Docket No. 76-1278
-against-	:	
DONALD M. JONES,	:	
Appellant	:	

BRIEF FOR THE APPELLANT DONALD M. JONES

STATEMENT OF THE CASE

In this bizarre narcotics trial, the Government's principal witness ingested a piece of a Government Exhibit, to wit, opium, while on the witness stand in plain view of the judge and jury, but unbeknownst to defendants or their counsel. The trial judge, in spite of his belief that members of the jury observed the incident, did nothing to bring the matter to the attention of the parties until a similar incident - this time detected by defendants' counsel - occurred days later. The evidence against appellant Jones was far from overwhelming.

Jones contends in this appeal that the failure of the trial judge to bring this matter to the attention of the litigants or to give an instruction to the jury, could be viewed by a reasonable juror as a condonation by the judge of the witness's behavior. The behavior of the trial judge thus constituted an improper communication to the jury. Such a communication creates a presumption of prejudice to the defendant, one which was not dispelled here. The error of the trial judge in making this communication and doing nothing to rectify it cannot be deemed harmless beyond a reasonable doubt. As a result, Jones was undoubtedly denied his right to a fair trial. Therefore the conviction must be reversed and the case remanded for a new trial.

Indictment 76 Cr. 400 charged Donald Jones, along with two others, with one count of conspiracy to import narcotics in violation of 21 U.S.C. 963 and one count of importation of narcotics in violation of 21 U.S.C. 952(a) and 960(a)(1). Jones was tried,

together with Robert L. Van Meerbeke, in the United States District Court for the Eastern District of New York before the Honorable Henry Bramwell and a jury. Both defendants on trial were found guilty as charged and on May 28, 1976, Jones was sentenced to two years imprisonment and five years special parole.

The conviction rested largely, if not solely, upon the testimony of Reuben Fife. Fife was permitted to plead guilty to one count of an information charging a violation of 21 U.S.C. 952(a), in return for his cooperation and testimony. On June 27, 1975, Fife was sentenced by the Honorable Henry Bramwell to a term of two years imprisonment. On December 15, 1975, this sentence was reduced by six months and was made subject to the provisions of 18 U.S.C. 4208(a)(2).

The Government's Case

Fife's testimony at trial revealed the following:

Fife had travelled to India in December of 1972 and again in September of 1973. While in India, Fife studied religion and became familiar with various drugs and sources for them. Fife knew the defendant Van Meerbeke for several years, and towards the end of 1974, he and Van Meerbeke discussed the possibility of smuggling drugs from abroad (Minutes of proceedings before Hon. Henry Bramwell, U.S.D.J., E.D.N.Y., March 25, 1976 at 154).* Particularly, the two discussed the possibility and feasibility of smuggling opium from India and selling it in California (156). After subsequent discussions, the two agreed that Fife, financed by Van Meerbeke, would travel to India, conceal a quantity of opium in a suitcase, and return to the United States via London, England and Montreal, Canada (159).

Fife would meet Jones in London, England and the two would return to the United States aboard the same flight. Jones would be travelling with a suitcase identical to the one in which Fife had secreted the

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* References to the trial transcript shall hereinafter be designated by the page number appearing within parentheses.

opium. Fife and Jones would switch baggage tags while in transit, and Fife would then deplane and leave the airport without the bag which he brought from India. Jones would attempt to clear Customs with the suitcase containing opium. Upon encountering difficulty in getting through Customs with the suitcase, Jones would claim that he had picked up the wrong suitcase by mistake. He would then claim that the other suitcase, which contained inocuous garments, was his and not the suitcase with the opium in it. Subsequently, Fife testified, he and Van Meerbeke purchased a gray Samsonite suitcase in a shopping center in San Rafael, California (162). They also bought fiberglass, to be used for making false compartments in the luggage (162). After testing the suitcase, Fife met Jones, who had been called by Van Meerbeke. Jones examined the suitcase and returned to his antiques shop (163).

Van Meerbeke drove Fife to a travel agency where Fife purchased a round trip ticket to India with money supplied by Van Meerbeke (165). The two then went to Jones' antiques shop in San Rafael where they were given a gray Samsonite suitcase by Jones (166). Fife discussed the plan only with Van Meerbeke, not with Jones (168). Sometime in March 1975, Fife departed

the United States bound for India (169). He was driven to the airport by Van Meerbeke who gave him expense money for the trip (170).

Fife testified on direct examination that upon arriving in India he purchased a quantity of opium from an Englishman known to Fife only as "Clem" (173). Counsel later elicited from Fife that the "Clem" he had earlier described in detail, did not, in fact, exist (510). Rather, "Clem" was a composite "source" used by Fife in an effort to keep the actual sources from becoming involved. Fife secreted the approximately four kilograms of opium that he had purchased in false fiberglass sidings of the gray Samsonite suitcase (175).

After completion of this stage of the plan, Fife spoke telephonically with Van Meerbeke who, Fife testified, advised him to change the destination on his return ticket from Montreal to New York; Fife complied (182-84). Fife said that subsequent phone calls to Van Meerbeke revealed other changes in the plan. Fife was told that Jones would be on board British Airways Flight 501 from Heathrow Airport in London instead of the previously planned Flight 509 (193). Van Meerbeke told Fife to change his flight plans accordingly (192). Fife did so but his flight from India to London arrived at

Heathrow Airport two hours late (195). Mrs. F. M. Kelly, an employee of British Airways at the airport testified that Donald Jones asked her if Fife had checked in for Flight 501 and made other inquiries regarding the status of Fife's flight from India.

Upon his arrival at Heathrow, Fife testified, he stood in line some distance away from Jones, who did not respond to a nod from Fife (199). Once aboard Flight 501, the two bumped into each other at the magazine rack. Once again, Fife said Jones seemed not to recognize him (199). Later in the flight, Jones sat next to Fife who offered Jones the baggage tags to the gray Samsonite suitcase containing opium. Jones refused to take the tags from Fife and returned to his seat in another part of the plane (513).

Unbeknownst to Fife, British Customs agents at Heathrow Airport had become suspicious, searched his baggage and discovered the opium. This information had been relayed to agents of the Drug Enforcement Agency in New York who were awaiting his arrival at JFK airport.

Fife did not see Jones again until they stood near one another at the baggage turnstile at JFK airport (202). Fife was soon arrested and the baggage tags for the opium filled suitcase were found rolled

up in the sleeves of his shirt (269). Fife made no statements regarding any possible confederates at this time. Jones picked up his own baggage and proceeded toward the Customs area (404). He was stopped and detained by agents of the Drug Enforcement Agency. The agents found a Customs Declaration on which Jones, an antiques dealer, declared a seventeenth century bronze statute that he had purchased in England (422). Jones was soon released from the custody of the agents (423). Fife, on the other hand, was taken to the Federal House of Detention at West Street where he was held in lieu of high bail.

Fife subsequently decided to cooperate with the Government. He was released after his bail was lowered. He testified before the Grand Jury which returned the indictment in this case. His testimony at trial was instrumental in the conviction of the two defendants.

Occurrences at Trial

Prior to the trial, counsel were provided with letters that Fife had written to Assistant United States Attorney Charles Clayman and a letter to Judge Bramwell. The defense sought to use these letters to impeach Fife on the ground that, at best, he was deceitful in his

representations to the Government and the Court. For instance, in a letter to the Court, Fife stated that he had resolved that he would "work with the society rather than against it." He went on to request a reduction in his sentence. However, in a letter written the next day to the Assistant United States Attorney, Fife stated that "America is not my scene" and that he hoped to return to India to live.

In the opening statement, defense counsel described Fife as having lied several times to the trial judge and the Government. At this point the trial judge interrupted the opening statement and challenged counsel in front of the jury:

> "THE COURT: All right, Counselor. Do you have proof of that?
>
> MR. HEINEMANN: Yes, I do.
>
> THE COURT: If you don't have proof, don't say that, because I have no reason to believe that, and for you to say that, I don't know what your source is, but you go right ahead." (108).

Counsel objected to the trial judge's comment and requested a conference at side bar. The basis for counsel's objection was the interjection of the trial judge relating directly to the credibility of the Government's principal witness (109).

During Fife's direct examination, he testified about his impression that Jones was ignoring him while on board Flight 501. After counsel objected to Fife's explanation of the reasons for this impression, the judge interjected:

> "THE COURT: He said he didn't seem to know him. Actually, the man knew him." (200).

Fife was asked, on cross-examination, about promises made by the Government at the time he decided to cooperate and testify for the Government. Once again the judge interjected, remarking that no promise was made by the Court (293):

> "THE COURT: Mr. Heinemann, just for your information, when this defendant was before me for sentence there was no promise made by the Court to him and he went through the normal sentence process, so there was no promise by the Court, but I want to give it to you just for your information, so you could go right ahead and continue your cross-examination." (293).

Again, counsel objected to the judge's statement of fact to the jury and asked the judge to withdraw the comment. The judge refused and denied a motion for a mistrial (294).*

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* Other similar interjections by the judge may be found at pages 307, 315, 322, 333 and 368 of the record.

Subsequently, Fife was cross-examined with regard to his representation, in his October 6 letter to Judge Bramwell, that he had been promised a release from prison in eight months. In response to a question asked of Fife, the judge answered:

> "Q: Did you represent to the Court in that letter that you had been promised and assured by Mr. Kramer and your attorney lthat you would be out in eight months.
>
> THE COURT: The answer to that is no." (315)

Moreover, the judge read aloud from the letter before it was introduced in evidence (316).

On Thursday, March 25, 1976, Fife took the witness stand and began his direct examination. In the midst of his testimony, Fife identified and handled Government Exhibit 1, the gray Samsonite suitcase that contained vestiges of opium (167). On Monday, March 29, while still on the witness stand, Fife was observed by defense counsel, among others, ingesting a piece of opium which had apparently come from Government Exhibit 1. Upon cross-examination, Fife admitted that he had eaten opium while he was on the witness stand on March 25 and on March 29. At this point, counsel for both defendants moved for a mistrial, and also moved to strike Fife's testimony from the record. (371-2)

In the course of denying these motions, on March 29, the trial judge informed counsel, for the first time, that he had seen Fife ingest opium while on the witness stand on Thursday, March 25. Moreover, the trial judge informed counsel that the jury had also seen Fife eating the opium at that time. (372)

On May 28, 1976, Jones moved for a new trial, prior to sentence, on the grounds that the ingestion of opium by Fife which was witnessed by both the trial judge and the jury, constituted a private communication with those jurors relating to a matter pending before the jury. Moreover, Jones contended that the failure of the trial judge to bring this matter to the attention of defendants of their counsel may have been interpreted by the jury as a condonation of Fife's actions and hence, may be deemed an improper communication with the jury. As an alternative to a new trial, Jones also requested a hearing at which these issues could be more fully determined.

Judge Bramwell denied the motion for a new trial and denied Jones the hearing that had been requested. From the denial of the motion and the judgment of conviction, Donald Jones appeals.

POINT I

THE FAILURE OF THE TRIAL JUDGE TO MAINTAIN THE APPEARANCE OF IMPARTIALITY DEPRIVED APPELLANT JONES OF HIS RIGHT TO A FAIR TRIAL

A. THE DISTRICT JUDGE UNDULY INTERJECTED HIMSELF INTO THE TRIAL

From the outset, the trial judge unduly interjected himself into the proceedings by interrupting counsels' opening statements to the jury, indicating his opinion as to crucial impeachment material of the Government's principal witness, bolstering the witness' credibility by answering questions posed to him, and parrying the thrusts of counsel on cross-examination by sua sponte explanations of circumstances regarding promises made in return for the witness' cooperation. In so doing, the trial judge violated his affirmative duty to maintain the appearance of impartiality and judicial detachment, and thus deprived Jones of the fair trial to which he was entitled.

It has long been acknowledged that a special relationship exists between judge and jury. The Supreme Court recognized the susceptibility of jurors to judicial influence at least as early as 1894 in Starr v. United States:

"It is obvious that under any system

> of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." 153 U.S. 614, 626 (1894).

This notion has become so strong in the federal courts that it is a matter for judicial notice that jurors are extremely sensitive to the trial judge's behavior. Burstein v. United States, 395 F.2d 976, 983 (5th Cir. 1968).

As this Circuit recognized in United States v. Ah Kee Eng, 241 F.2d 157, 161 (2d Cir. 1957), the trial judge "must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings." See also United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970). The trial judge bears the responsibility of insuring that the facts in each case are presented to the jury in a clear and straightforward manner. United States v. Nazarro, 472 F.2d 302 (2d Cir. 1973).

Given this influence and responsibility, the judge has an affirmative obligation to maintain at all times an appearance of impartiality and judicious detachment. United States v. Nazarro, supra. In this regard, this Court, in United States v. Cruz, 455 F.2d 184 (2d Cir. 1972), endorsed the A.B.A. Advisory Committee's standards for the rendering of criminal justice

> "The trial judge should be the exemplar

> of dignity and impartiality. He should exercise restraint over his conduct and utterances. He should suppress his personal predilections, and control his temper and emotions. He should not permit any person in the courtroom to embroil him in conflict, and he should otherwise avoid conduct on his part which tends to demean the proceedings or to undermine his authority in the courtroom. When it b ecomes necessary during the trial for him to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, he should do so in a firm, dignified and restrained manner, avoiding repartee, limiting his comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues."
>
> A.B.A. Project on Standards for Criminal Justice, Advisory Committee on the Judge's Function, Standards Relating to the Judge's Role in Dealing with Trial Disruptions, Standard B. 1, at 6.

The fact that in this case the Government's proof was based primarily on the testimony of an alleged co-conspirator compels this Court to scrutinize the claimed error with great care. United States v. Persico, 305 F.2d 534 (2d Cir. 1962). Where, as here, the defendant's guilt or innocence rests almost exclusively on the jury's evaluation of a witness' demeanor and credibility, this Court cannot ignore interjections by the trial judge which clearly signal to the jury the judge's partisanship. See United States v. Nazarro, supra. Even if a judge's interjections are not motivated by a partisan purpose, he must not "permit even the

appearance of such an interference," United States v. Curcio, 279 F.2d 681, 682 (2d Cir. 1960), but must remain "impartial, judicious, and, above all responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested." United States v. Brandt, 196 F.2d 653, 655-56 (2d Cir. 1952).

In the present case, however, the mandate of judiciousness was frequently breached. Well before the judge failed to act in response to the commission of a crime on the witness stand before him, see infra at p.23, he had already unduly interjected himself into the proceedings. The first instance occurred during defense counsel's opening statement to the jury.

Prior to the trial, counsel were provided with letters which the Government's witness, Fife, had written to Assistant United States Attorney Charles Clayman as well as a letter written by Fife to Judge Bramwell on October 6 in support of a motion for a reduction in sentence. The defense sought to use these letters for the prupose of impeaching Fife on the ground that, at best, he was merely deceitful in his representations to the Government and the Court. For instance, in the October 6 letter to Judge Bramwell, Fife stated that he had resolved that he would "work with the society rather than against it." He went on to request a reduction in sentence which was subsequently granted by Judge Bramwell.

However, in a letter written the very next day to the Assistant United States Attorney, Fife stated that "America is not my scene" and that he hoped to return to India to live.

In his opening statement to the jury, defense counsel described Fife as having lied several times to the trial judge and the Government. At this point the judge interrupted the opening statement and challenged counsel in front of the jury:

> THE COURT: All right. Counsellor. Do you have proof that he lied to me? Do you have proof of that?
>
> MR. HEINEMANN: Yes, I do.
>
> THE COURT: If you don't have proof, don't say that, because I have no reason to believe that, and for you to say that, I don't know what your source is, but go go right ahead (108) (emphasis supplied).

Counsel objected to the judge's comment and requested a conference at side bar. The basis for counsel's objection was the interjection of the trial judge relating directly to the credibility of the Government's principal witness (109). Thus, the jury was conditioned, prior to hearing this crucial witness, by the judge's view as to his credibility.*

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* Later in the case, in the midst of counsel's cross-examination of Fife, the judge, at side bar, sought to preclude counsel from eliciting the fact that Fife had lied to the judge:

Fife was asked, on cross-examination, about promises made by the Government at the time he decided to cooperate and testify for the Government. Once again, the judge interjected, remarking that no promise was made by the Court:

> "THE COURT: Mr. Heinemann, just for your information, when this defendant was before me ror sentence there was no promise made by the Court to him and he went through the normal sentence process, so there was no promise by the Court, but I want to give it to you just for your information, so you could go right ahead and continue your cross-examination." (292)

Again, counsel objected to the judge's statement of fact to the jury, asked the judge to withdraw the comment and to instruct the jury with respect to their function as the sole factfinders in the case. The judge refused all such requests and denied a motion for a mistrial (292).

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*(continued)

> "THE COURT: It wasn't me he lied to. He might have lied to the probation officer or department, but he never lied to me, I don't want you to say that any more.
>
> MR. HEINEMANN: I'm in a difficult position.
>
> THE COURT: Do you understand what I told you?
>
> MR. HEINEMANN: I do, your Honor.
>
> THE COURT: That's what I want you to do.
>
> MR. HEINEMAN: All right.
>
> THE COURT: Don't say 'that you lied to Judge Bramwell.' Don't put the Court into this case." (235)

Subsequently, Fife was cross-examined with regard to his representation, in his October 6 letter to Judge Bramwell, that he had been promised a release from prison in eight months. In response to a question asked of Fife, the judge answered:

> "Q: Did you represent to the Court in that letter that you had been promised and assured by Mr. Kramer and your attorney that you would be out in eight months.
>
> THE COURT: The answer to that is no." (315)

Moreover, the judge read aloud from the letter before it was introduced in evidence (316).

The judge's position on this important piece of impeachment material, a position made clear to the jury, is belied by the fact that on October 24, 1975, the judge asked for a response in the form of sworn affidavits from the United States Attorney as well as Fife's attorney, to these allegations contained in Fife's October 6 letter. See United States v. Fife, Dkt. No. 75 CR 336 (E.D.N.Y.) letter of Richard M. Weinberg, Law Clerk, dated October 24, 1975.

Later in the trial, a letter Fife had written to Assistant United States Attorney Clayman was read to the jury. In the letter, Fife mentioned that a fellow inmate, charged with the same offense as he, was designated by a judge to Allenwood prison (332-33). Judge

Bramwell, sua sponte, interjected:

> "THE COURT: I might say the Judge in here who specified someone for Allenwood was not me. I do not make recommendations as to any prison that any defendant goes to, and that I can assure was not Judge Bramwell." (333)

Counsel made no suggestion to the contrary.*

Thus, the trial judge embarked on a constant course of obstruction and interjection into proceedings below.

While most decisions focusing on a trial judge's prejudicial conduct deal with excessive participation in the questioning of witnesses, the conduct of the judge in the trial below was no less prejudicial. The essence of the prejudice arising from the trial judge's conduct lies in the conveyance of a partisan purpose or the appearance thereof. See United States v. Curcio, supra. The means by which the feelings of the judge are communicated is immaterial. All that matters is that the jury received communications bearing directly upon issues which lie at the heart of the case.

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* Other instances in which the judge, sua sponte, aided the witness, may be found at pages 200 and 368 of the record.

Particularly when juxtaposed with the egregious communication of the trial judge discussed infra, Point I-B, the court's interjections take on even greater significance. In this case, the trial judge's interjections clearly evinced a belief regarding the credibility of the Government's principal witness as well as an assessment of the substance and value of material used in impeaching his credibility.

The impact that this conduct had upon the jury cannot be overstated. The imposition of the attitudes of the trial judge upon a jury extremely susceptible to those attitudes led ineluctably to the compromising of the impartiality of the jury, and thus deprived Jones of his crucial fifth and sixth amendment rights to due process and to a trial by an impartial jury.

The expressions of partisanship by the trial judge were not limited to comments upon the evidence, answers to questions put to the Government's witness, and admonitions to counsel. The trial judge also prejudicially communicated his feelings about the case by unspoken behavior as well, as is discussed infra.

B. THE CIRCUMSTANCES SURROUNDING THE INGESTION OF OPIUM BY THE GOVERNMENT'S PRINCIPAL WITNESS WHILE ON THE WITNESS STAND DEPRIVED JONES OF A FAIR TRIAL

Reuben Fife first took the witness stand on Thursday, March 25, 1976, and testified throughout the entire afternoon until the Court recessed at approximately 4:30 P.M. On that day Fife handled an identified Government Exhibit #1, a gray Samsonite suitcase used by Fife in smuggling from India the opium seized in the case (190-191). Fife testified that there was still some loose opium remaining in the suitcase although most of it was segregated in a separate plastic bag which was introduced as Government's Exhibit #6.

On Monday, March 29, Fife was again on the witness stand, this time for the conclusion of the cross-examination. Subsequent to the luncheon recess, both defendants and their respective counsel observed Fife place into his mouth an unidentifiable object which appeared to have come from Government's Exhibit #1, the suitcase. Upon cross-examination immediately thereafter, Fife was asked whether he had, in fact, ingested opium while on the witness stand. He admitted that he had, and further admitted having eaten opium on the witness stand on March 25 (369-70).

Counsel for both defendants immediately moved for a mistrial (371-72). The trial judge denied the motions, stating that he had already seen Fife ingest opium during his first day on the witness stand, Thursday, March 25 (372). Thus, the defense was caught by complete surprise, as this was the first time that any mention was made by the trial judge of this prior observation of Fife to either the Government, the defendants, or their counsel. Even more surprisingly, the trial judge then stated that many of the jurors had also seen Fife eating the opium on the witness stand on March 25 (372; 475)

By refraining from taking any initiative to rectify this bizarre and highly prejudicial incident on its first occurrence, the trial judge violated his affirmative duty to maintain the integrity of the fact-finding process. In light of the trial judge's statement that many of the jurors had, in fact, seen the incident, the Court's failure to promptly bring this matter to the attention of the defendants could not help but suggest to the jury that the Court condoned the behavior and endorsed the credibility of this crucial witness. The trial judge's failure to bring this matter to light constituted a subtle, effective, albeit improper, communication to the jury.

It is well established that in a criminal case, any private communications, direct or indirect, with jurors during a trial about matters pending before the jury are absolutely forbidden. Moreover, the communication is presumed prejudicial and a new trial must be granted unless the Government can establish "that such communication with the jury was harmless to the defendant." Remmer v. United States, 347 U.S. 227, 229 (1954); United States v. Brasco, 516 F.2d 816, 819 (2d Cir. 1975). Thus, the Government bears the burden of persuasion in demonstrating that the communication with the jury was harmless to the defendant. United States v. Pfingst, 477 F.2d 177 (2d Cir. 1973). See United States v. Gersh, 328 F.2d 460, 464 (2d Cir. 1964).

The insistence upon this standard is necessary, not only to insure that the defendant received a fair trial by impartial jurors, but also to maintain the integrity of the jury system. Inherent in our scheme of justice is the assumption that litigants have faith in the probity of jury verdicts. Absent such faith, the stability on which we depend for the orderly functioning of our legal system would be in doubt. As the Sixth Circuit stated in Stone v. United States, 113 F. 2d 70, 77 (1940):

> The question is, not whether any actual wrong resulted from the [communicati.] . . . . with the juror . . . . but whether it created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice. When the judgment is weak, prejudice is strong, and it is essential to faith in the jury system that jurors should determine the facts submitted to them wholly on the evidence offered in open court, unbiased and uninfluenced by anything they may have seen or heard outside of the actual trial of the case. Id.

The leading case in this area is Remmer v. United States, supra. During the trial in Remmer, an improper communication was made to a juror and was reported immediately to the court. The juror had been offered a "profit" if he voted to acquit. The trial court never informed the defendant of the incident. Instead, based upon the results of a requested F.B.I. investigation, the court concluded that the incident was harmless. Upon learning of these events after trial, the defendant moved for a new trial. Without holding a hearing, the trial court denied the motion and the Ninth Circuit affirmed. The Supreme Court reversed and remanded the case for an adversary hearing to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial," since the "trial court should not decide and take final action ex parte on information such as was received in this case." Remmer, supra, 347 U.S. at 229-30.

The linchpin of Remmer was the trial court's failure to inform the defendant and his attorney that there had been a communication with the juror. In the instant case, the situation is compounded by the fact that the judge's failure to inform the defendant or his attorney constituted a communication with those jurors who were privy to the incident of opium ingestion by the witness.

It is clear beyond peradventure of doubt that communications between judge and jury in the absence of, and without proper notice to, the defendant and his counsel are improper. United States v. Treatman, 524 F.2d 320 (8th Cir. 1975). Such communications create a presumption of prejudice. Rogers v. United States, 422 U.S. 35 (1975). The presumption may only be overcome by evidence giving a clear indication of lack of prejudice. Rice v. United States, 356 F.2d 709, 717 (8th Cir. 1966).

Traditionally, in cases dealing with alleged juror taint, hearings were actually held or ordered upon remand. See, e.g., Remmer v. United States, supra; United States v. Pfingst, supra. In the present case, defendant Jones moved for a new trial and for a hearing based upon the improper communication

made by the trial judge to the jury, in order to fall within the ambit of the law of this Circuit, cf. United States v. Gersh, supra.

However, the present case of improper communications with the jury is unlike all others falling within the general rubric of "extraneous influence." See also United States v. Lubrano, 529 F.2d 633 (2d Cir, 1975); United States v. Brasco, supra. In those cases, the alleged extraneous influences upon the jurors derived from communications from an unknown source, United States v. Gersh, supra, or did not relate to a matter pending before the jury, United States v. Pfingst, supra; United States v. Lubrano, supra, and were clearly harmless.

While these cases are instructive as to the principles to be applied, the circumstances of the present case take it well beyond the traditional authority. For here, a hearing would serve little purpose. The record is clear and the prejudice is apparent.

The trial judge stated, during a side bar conference, that both he and the jury were privy to the ingestion of opium by this crucial Government witness

(372). Given the trial judge's belief that, at the time of the incident, the jury had seen the commission of a crime on the witness stand, it was imperative that he bring this matter to light. Remmer v. United States, supra. Instead, the judge took absolutely no action, thereby communicating to the jury the impression that he condoned the behavior of the witness. Clearly, the impartiality of the jury would inevitably be compromised unless the communication was tempered by "instructions and directions of the court made during the trial." Remmer v. United States, supra, 347 U.S. at 229. However, the judge did nothing of the sort, thus exacerbating the egregious communication.

This incident clearly impugned the disinterestedness of the Court. In addition to the violation of defendant Jones' right to due process under the fifth amendment, the incident also violated his sixth amendment right to an impartial jury.

In Turner v. Louisiana, 379 U.S. 466 (1965), the Supreme Court held that a new trial was required where the two principal prosecution witnesses were deputies who also had charge of the sequestered jury. The Court found that, in a trial where credibility was a crucial issue, by giving the deputies the important

role of guarding the very jury that had to evaluate their credibility as witnesses, the trial court in Turner had impermissably bolstered their character and, indirectly, lent a credibility to their testimony not warranted by the evidence developed at trial.

In the instant trial, the jurors who saw Fife take opium on the witness stand* (and who doubtless noticed the trial judge's attention to the same incident) were subject to the inevitable suggestion that the trial judge was protecting the witness.** Moreover, the condonation by silence of the behavior of the Government's principal witness by the trial judge lent credibility to the testimony of the witness which was not developed by evidence at the trial.***

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*The trial judge himself indicated that the jury saw at least the same March 25 incident (372; 475).

**The trial judge had already interrupted counsel on many occasions during their attack on Fife's credibility. See Point I-A, supra

***Fife was severely impeached on many points, and ultimately returned to the witness stand at the request of the defendants in order to recant his previous testimony regarding the source of the opium (510).

In addition to violating the defendant's sixth amendment rights, the trial judge also violated the duty of the Court to protect the integrity of its own processes, which requires that no verdict be the product of partiality, or its semblance, on the part of the court. This duty is all the more binding because of the weight jurors are likely to accord expressions and communications from the court. See Point I-A, supra.

Prejudice

In most cases involving claims of due process deprivations, courts require a showing of identifiable prejudice to the defendant. Nevertheless, there occur incidents which involve so substantial a probability that prejudice will result that they are deemed inherently to deprive a defendant of due process. The trial below involved such an occurrence. As the Supreme Court stated, albeit in another context, in In Re Murchison, 349 U.S. 133, 136 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' Offut v. United States, 348 U.S. 11, 14." Id., 349 U.S. at 136 (Emphasis supplied.)

Thus, in both Turner v. Louisiana, supra, and Parker v. Gladden, 385 U.S. 363 (1966), the Supreme Court did not stop to weigh the actual prejudicial effect of the conduct but overturned the convictions on the ground that prejudice was inherent. In Parker, a baliff assigned to shepherd the sequestered jury made statements regarding his opinion as to the guilt of the accused. In Turner, the probability of prejudice was present through the use of deputy sheriffs, who were also trial witnesses as shepherds for the jury. In both instances, the Court found the circumstances to be inherently suspect, and, therefore, did not require an affirmative showing of prejudice.

While a demonstration of actual prejudice is not a requisite to reversal in the instant case, the prejudice here is apparent. Before their very eyes, the jurors witnessed an alleged accomplice and admitted friend of the defendants unable to restrain himself from indulging in eating the very opium the defendants were charged with smuggling. Thus, rather than considering this case on its merits, it is inconceivable that the jury could avoid considering this shocking and inherently prejudicial act. Moreover, the judge's

failure to bring the matter to counsel's attention must have been interpreted by those jurors who were privy to the incident as a condonation of the behavior, demeanor, and credibility of this crucial witness. "It would be blinking reality not to recognize the extreme prejudice inherent in the conduct of the witness and that of the trial judge. Turner v. Louisiana, supra at 473.

Curative Effect of Charge

The Court's charge to the jury did nothing to cure those errors that occurred during trial. Concededly, the trial judge charged the jury that its view of the case controlled and that it was not to consider the actions of the trial judge in reaching the verdict. However, given the circumstances of this case, it was unrealistic to suppose that an eleventh-hour boiler-plate charge could remove the impression the judge had given the jury throughout the trial. United States v. Desisto, supra, 289 F.ed at 835. Indeed, the trial judge did not constantly admonish the jury of its final responsibility as the sole finder of the facts during the course of the trial.* Cf., United States v. Curcio,

*When the trial judge interrupted the cross-examination of Fife to state, sua sponte, to the jury that no promise was made by the Court at the time of Fife's sentence, counsel asked the trial judge to withdraw the comment and to instruct the jury as to its function as the sole factfinder. The trial judge refused (294).

An admonition in the charge that the jury's view of the case controlled "may offset brief or minor departures from strict judicial impartiality," but cannot be considered sufficient here. United States v. Brandt, supra, at 656 (2d Cir. 1952). The only remedy for the prejudice suffered here is to reverse the conviction and grant a new trial. United States v. Desisto, 289 F.2d (2d Cir. 1961); United States v. Brandt, supra.

Thus, the conduct of the trial judge constituted error: plain, prejudicial and reversible error. The failure of the trial judge to act when faced with this outrageous occurrence in the midst of a federal criminal trial was inexcusable. It amounted to a communication to the jury that the trial judge condoned the behavior and demeanor of this crucial, judicially protected witness, and thereby lent a credibility to his testimony that was not warranted by the evidence developed at trial. Turner v. Louisiana, supra. When viewed in the context of the prior prejudicial interjections by the Court, Point I-A, supra, the communication becomes all the more egregious. The totality of the circumstances clearly indicate that the defendant, Donald Jones, was deprived of his right to a fair trial by an impartial jury.

POINT II

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE APPELLANT JONES ADOPTS THE ARGUMENTS SET FORTH IN THE BRIEF OF APPELLANT ROBERT L. VAN MEERBEKE

CONCLUSION

FOR THE FOREGOING REASONS, THE CONVICTION SHOULD BE REVERSED AND THE APPELLANT GRANTED A NEW TRIAL.

Respectfully submitted,

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October 26, 1976

United States Court of Appeals
for the Second Circuit

United States of America,

Appellee,

against

Donald M. Jones,

Defendant-Appellant.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Charles Esposito, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 77 Broadway, Malverne, New York
That on October 26, 1976, he served 2 copies of
on Brief

Hon David G. Trager,
225 Cadman Plaza, EAST
Brooklyn, New York, 11201.

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Charles Esposito

Sworn to before me this
26th day of October, 1976.

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977